Office - Supreme Court, U. S.
FILED
MAY 26 1952
CHARLES ELMORE CROPLEY
CLERK

344 US
NAT - NO
44

IN THE

Supreme Court of the United States

October Term, 1951

No. 82

NATIONAL MUTUAL INSURANCE COMPANY
of the District of Columbia,
Petitioner

v.

LIBERTY MUTUAL INSURANCE COMPANY, a Corporation, and
ELLIOTT BROS. TRUCKING COMPANY, INC.,
a Corporation,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT THEREOF

CORNELIUS H. DOHERTY
ALFRED L. BENNETT
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorneys for Petitioner

WILSON - EPES PRINTING CO. - RE 6003 - WASHINGTON 1, D. C.

INDEX

PAGE

Petition 1

Summary Statement of Matter Involved 1

The Basis of the Court's Jurisdiction 4

Statutes Involved 4

Questions Presented 8

Reasons Relied Upon for the Allowance of the Writ 9

Brief in Support of Petition 11

Opinion of the Court Below 11

Specification of Errors 12

Argument 12

James V. Mench, Jr. was an insured under the policy of insurance issued to the Respondent, Elliott Bros. Trucking Company, Inc. 12

Mench was an insured under the endorsement to the policy of the Respondent filed with the Interstate Commerce Commission 17

The United States Court of Appeals for the District of Columbia Circuit is confined in its decision to the grounds assigned by the Trial Court in its order 21

Conclusion 23

Statutes

Title 49, Section 315 of U. S. C. A. 4

Cases Cited

American Fidelity and Casualty Company v. Pennsylvania Casualty Company, 97 Fed. Supp. 965—affirmed 188 Fed. (2d) 364 ..... 9, 18

Lumber Mutual Casualty Insurance Company of New York v. Stukes, 164 Fed. (2d) 571—Fourth Circuit 9, 14

JUN 2 1954

206557

PAGE

Malifsky v. Indemnity Insurance Company of North America, 135 F. (2d) 910—Fourth Circuit..... 9, 13
Rectangle Ranche Co. v. Board of Commissioners, 96 Fed. (2d) 825..... 23
State Farm Mutual Automobile Insurance Company v. Brooks, 136 Fed. (2d) 807—Eighth Circuit..... 9, 16
Thorn v. Brown, 257 Fed. 519..... 9, 22
War Emergency Coop. Association v. Widenhouse, 169 Fed. (2d) 402—Fourth Circuit..... 9, 17

IN THE

Supreme Court of the United States

October Term, 1951

No. .....

NATIONAL MUTUAL INSURANCE COMPANY
of the District of Columbia,
Petitioner

v.

LIBERTY MUTUAL INSURANCE COMPANY, a Corporation, and
ELLIOTT BROS. TRUCKING COMPANY, INC.,
a Corporation,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

The petition of National Mutual Insurance Company of the District of Columbia, a Corporation, for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit entered on the 24th day of April, 1952, affirming a judgment of the United States District Court for the District of Columbia granting a motion for summary judgment, respectfully shows:

SUMMARY STATEMENT OF MATTER INVOLVED

On September 19, 1950, one Jennie M. Emens sued your petitioner in the United States District Court for the

District of Columbia alleging that on December 16, 1949, she obtained a judgment against one James V. Mench, Jr., on which there was a balance outstanding of Five Thousand Dollars ($5000.00); that Mench had a policy of insurance with your petitioner which obligated your petitioner to pay to Emens the sum of Five Thousand Dollars ($5000.00) (R. 2-4).

Your petitioner filed an answer to the complaint admitting that it had issued a policy of insurance in the sum of Five Thousand Dollars ($5000.00) which was in effect under the terms of its policy at the time of the accident, but that it was not obligated to pay the Five Thousand Dollars ($5000.00) for the reason that Mench had leased his tractor and trailer to Elliott Bros. Trucking Company, Inc., at the time of the accident and was under the direction and control and on the business of Elliott Bros. Trucking Company, Inc., and that Elliott Bros. Trucking Company, Inc., had a policy of insurance covering the tractor and trailer, and that under the terms of the policy issued by your petitioner its insurance became excess insurance over and above that issued to Elliott Bros. Trucking Company. Your petitioner further averred that James V. Mench, Jr., was operating his tractor and trailer under the Interstate Commerce Commission permit of Elliott Bros. Trucking Company, Inc. (R. 4-6)

Your petitioner filed a third-party complaint against Elliott Bros. Trucking Company, Inc., and its insurance carrier, Liberty Mutual Insurance Company, in which the foregoing facts were alleged and praying, among other things, that in the event of a judgment against your petitioner that it be given a judgment against Liberty Mutual Insurance Company, a Corporation, and Elliott Bros. Trucking Company, Inc., a Corporation, for all sums that might be adjudged against it in favor of the plaintiff, Jennie M. Emens. (R. 7-8)

The respondent, Elliott Bros. Trucking Company, Inc., denied that at the time of the aicident the tractor and trailer, which was operated by Mench, was under lease to the respondent or that it was being operating under its direction or control or on its business. The respondent, Liberty Mutual Insurance Company, made the same denials and denied that it had a policy of insurance which covered Mench. (R. 8-10)

The respondents filed a motion for summary judgment pursuant to the provisions of Rule 56 of the Federal Rules of Civil Procedure and there was available to the trial Court at the time of the hearing of the motion the deposition of Leo Riley Pedigo, Secretary-Treasurer of Elliott Bros. Trucking Company, Inc., the policies of insurance issued by your petitioner to James V. Mench, Jr., the policy of insurance issued by the respondent, Liberty Mutual Insurance Company, to the respondent, Elliott Bros. Trucking Company, Inc., and the endorsement for motor carrier policies of insurance for bodily injury liability, under Section 215 of the Interstate Commerce Act which had been filed by the respondent, Liberty Mutual Insurance Company with the Interstate Commerce Commission on behalf of Elliott Bros. Trucking Company.

The respondents, in open Court, admitted that James V. Mench, Jr. had leased his truck to Elliott Bros. Trucking Company, Inc., and was on the business of said company at the time of the accident and the Court held that Mench was not an insured under Liberty Mutual's policy of insurance with Elliott Bros. Trucking Company, Inc., and granted the respondents' motion for a summary judgment. (R. 11-19)

An appeal was taken from the action of the Trial Court of the United States Court of Appeals for the District of Columbia Circuit. (R. 20)

The United States Court of Appeals for the District of Columbia Circuit, in its opinion affirming the action of the Trial Court, stated that Mench was not an insured under the policy of the Liberty Mutual Insurance Company. The Court further passed upon the question of subrogation claimed by your petitioner over its objection that the Trial Court granted judgment on the limited ground that Mench was not an insured under the Liberty Mutual policy and that, therefore, your petitioner would be prejudiced if the case was decided on any other ground without permitting it to amend its pleadings to conform with any objection thereto.

On April 24, 1952, the United States Court of Appeals for the District of Columbia Circuit affirmed the action of the United States District Court for the District of Columbia granting the motion for summary judgment. (R. 22-26)

THE BASIS OF THE COURT'S JURISDICTION

The jurisdiction of this Court is based upon Section 240 (a) of the Judicial Code, as amended, Title 28 U. S. C. A., sec. 1254 (1).

The date of the judgment sought to be reviewed is April 24, 1952.

STATUTES INVOLVED

Title 49, Section 315 of U. S. C. A.:

Security for protection of public

"No certificate or permit shall be issued to a motor carrier or remain in force, unless such carrier complies with such reasonable rules and regulations as the Commission shall prescribe governing the filing and approval of surety bonds, policies of insurance, qualifications as a self-insurer or other securities or

agreements, in such reasonable amount as the Commission may require, conditioned to pay, within the amount of such surety bonds, policies of insurance, qualifications as a self-insurer or other securities or agreements, any final judgment recovered against such motor carrier for bodily injuries to or the death of any person resulting from the negligent operation, maintenance, or use of motor vehicles under such certificate or permit or for loss or damage to property of others. The Commission may, in its discretion and under such rules and regulations as it shall prescribe, require any such common carrier to file a surety bond, policies of insurance, qualifications as a self-insurer, or other securities or agreements, in a sum to be determined by the Commission, to be conditioned upon such carrier making compensation to shippers and/or consignees for all property belonging to shippers and/or consignees, and coming into the possession of such carrier in connection with its transportation service. Any carrier which may be required by law to compensate a shipper and/or consignee for any loss, damage, or default for which a connecting motor common carrier is legally responsible shall be subrogated to the rights of such shipper and/or consignee under any such bond, policies of insurance, or other securities or agreements, to the extent of the sum so paid. Feb. 4, 1887, c. 104, Part II, § 215, as added Aug. 9, 1935, c. 498, 49 Stat. 447."

ENDORSEMENT TO POLICY OF RESPONDENT, ELLIOTT BROS. TRUCKING COMPANY, INC., FILED BY LIBERTY MUTUAL WITH INTERSTATE COMMERCE COMMISSION

The policy to which this endorsement is attached is an automobile bodily injury liability and property damage liability policy, and is hereby amended to assure compliance by the insured, as a motor carrier of passengers or property, with section 215 of the Interstate Commerce Act, and the pertinent rules and regulations of the Interstate Commerce Commission.

In consideration of the premium stated in the policy to which this endorsement is attached, the Company

hereby agrees to pay any final judgment recovered against the insured for bodily injury to or the death of any person or loss of or damage to property of others (excluding injury to or death of the insured's employees while engaged in the course of their employment, and loss of or damage to property of the insured, and property transported by the insured, designated as cargo), resulting from the negligent operation, maintenance, or use of motor vehicles under certificate of public convenience and necessity or permit issued to the insured by the Interstate Commerce Commission, or otherwise under Part II of the Interstate Commerce Act within the limits of liability hereinafter provided, regardless of whether such motor vehicles are specifically described in the policy or not. It is understood and agreed that upon failure of the Company to pay any such final judgment recovered against the insured, the judgment creditor may maintain an action in any court of competent jurisdiction against the Company to compel such payment. The bankruptcy or insolvency of the insured shall not relieve the Company of any of its obligations hereunder. The liability of the Company extends to such losses, damages, injuries, or deaths whether occurring on the route or in the territory authorized to be served by the insured or elsewhere, except as follows:

(Name as exceptions only States in which the insured's operations are covered by other insurance)

The liability of the Company on each motor vehicle for the following limits shall be a continuing one notwithstanding any recovery hereunder:

Nothing contained in the policy or any other endorsement thereon, nor the violation of any of the provisions of the policy or of any endorsement thereon by the insured, shall relieve the Company from liability hereunder or from the payment of any such final judgment.

The insured agrees to reimburse the Company for any payment made by the Company on account of any accident, claim, or suit involving a breach of the terms of the policy, and for any payment that the

Company would not have been obligated to make under the provisions of the policy, except for the agreement contained in this endorsement.

This endorsement may not be canceled without cancelation of the policy to which it is attached. Such cancelation may be effected by the Company or the insured giving thirty (30) days' notice in writing to the Interstate Commerce Commission at its office in Washington, D. C., said thirty (30) days' notice to commerce to run from the date notice is actually received at the office of said Commission.

DEFINITION OF INSURED CONTAINED IN POLICY OF RESPONDENTS

DEFINITION OF INSURED. With respect to the insurance for bodily injury liability and for property damage liability the unqualified word "insured" includes the named insured and also includes any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile is by the named insured or with his permission, and any executive officer of the named insured with respect to the use of a non-owned automobile in the business of the named insured. The insurance with respect to any person or organization other than the named insured does not apply:

(a) with respect to an automobile while used with any trailer owner or hired by the insured and not covered by like insurance in the company; or with respect to a trailer while used with any automobile owned or hired by the insured and not covered by like insurance in the company;

(b) to any person or organization, or to any agent or employee thereof, operating an automobile repair shop, public garage, sales agency, service station or public parking place, with respect to any accident arising out of the operation thereof;

(c) to any employee with respect to injury to or sickness, disease or death of another employee of the same employer injured in the course of such employment in an accident arising out of the maintenance

or use of an automobile in the business of such employer;

(d) with respect to any hired automobile, to the owner thereof or any employee of such owner;

(e) with respect to any non-owned automobile, to any executive officer if such automobile is owned by him or a member of his household.

THE FOLLOWING EXCEPTION COVERING OTHER INSURANCE AS CONTAINED IN POLICY OF INSURANCE ISSUED BY PETITIONER

19. Other Insurance Coverages A, B, D, E-1, E-2, F, G-1, H and J

If the insured has other insurance against a loss covered by this policy the company shall not be liable under this policy for a greater proportion of such loss than the applicable limit of liability stated in the declarations bears to the total applicable limit of liability of all valid and collectible insurance against such loss; provided, however, the insurance under Insuring Agreements V and VI shall be excess insurance over any other valid and collectible insurance available to the insured, either as an insured under a policy applicable with respect to the automobile or otherwise, against a loss covered under either or both of said insuring agreements.

QUESTIONS PRESENTED

1. Was the United States Court of Appeals for the District of Columbia Circuit in error in holding that James V. Mench, Jr. was not an insured on the policy of the respondent, Liberty Mutual Insurance Company issued to Elliott Bros. Trucking Company, Inc.?

2. Was the United States Court of Appeals for the District of Columbia Circuit in error in holding that James V. Mench, Jr. was not an insured on the endorsement to the policy issued to Elliott Bros. Trucking Company, Inc., and filed with the Interstate Commerce Com-

mission in order to obtain a permit to operate in Interstate Commerce.

3. Was the United States Court of Appeals for the District of Columbia Circuit in error in attempting to decide the case on a ground other than the ground upon which the Trial Court based its decision?

REASONS RELIED UPON FOR THE ALLOWANCE OF THE WRIT

1. The decision of the United States Court of Appeals for the District of Columbia is in conflict with the various Circuit Courts of Appeals in the following decisions:

Malifsky v. *Indemnity Insurance Company of North America*, 135 F. 2d 910—Fourth Circuit
State Farm Mutual Automobile Insurance Company v. *Brooks*, 136 Fed. (2d) 807—Eighth Circuit
Lumber Mutual Casualty Insurance Company of New York v. *Stukes*, 164 Fed. (2d) 571—Fourth Circuit.
War Emergency Coop. Association v. *Widenhouse*, 169 Fed. 2d 402—Fourth Circuit
American Fidelity and Casualty Company v. *Pennsylvania Casualty Company*, 97 Fed. Supp. 965, affirmed in *American Fidelity and Casualty Company* v. *Pennsylvania Casualty Company*,—Sixth Circuit—188 Fed. (2d) 364
Thorn v. *Brown*, 257 Fed. 519

2. The decisions of the Fourth Circuit Court of Appeals are decisions construing the definition of an insured in a policy with the same wording as the policy in the instant case and construing that Mench would be an insured under the policy issued to the respondent, Elliott Bros. Trucking Company, Inc.

3. A decision of the Fourth Circuit and a decision of the Sixth Circuit construe the word "insured" contained

in the filing with the Interstate Commerce Commission and holds that Mench is an insured under the endorsement filed with the Interstate Commerce Commission.

4. The decision of the United States Court of Appeals for the District of Columbia in this case holds that Mench is not an insured under the policy issued to Elliott Bros. Trucking Company, Inc., whereas, if the case had been filed in Maryland or Virginia in the United States Courts Mench would be held to be an insured both under the policy of insurance issued to the respondent, Elliott Bros. Trucking Company, Inc., and under the endorsement which was filed with the Interstate Commerce Commission and under which permit Mench was operating at the time the accident occurred.

WHEREFORE, it is respectfully submitted that this petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the District of Columbia Circuit should be granted.

CORNELIUS H. DOHERTY
ALFRED L. BENNETT
1010 Vermont Avenue, N. W.
Washington, D. C.
Attorneys for Petitioner

IN THE

Supreme Court of the United States

October Term, 1951

No. .....

NATIONAL MUTUAL INSURANCE COMPANY
of the District of Columbia

Petitioner

v.

LIBERTY MUTUAL INSURANCE COMPANY, a Corporation, and
ELLIOTT BROS. TRUCKING COMPANY, INC.,
a Corporation

Respondents

BRIEF IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

OPINION OF THE COURT BELOW

The opinion of the United States Court of Appeals for the District of Columbia has not been officially reported at the time this is written, but is printed in the record (R. 22-26).

SPECIFICATION OF ERRORS

1. The United States Court of Appeals for the District of Columbia Circuit erred in holding that James V. Mench, Jr. was not an insured under the policy of insurance issued to the respondent, Elliott Bros. Trucking Company, Inc.

2. The United States Court of Appeals for the District of Columbia Circuit erred in holding that James V. Mench, Jr. was not an insured under the endorsement to the policy issued to Elliott Bros. Trucking Company, Inc., and filed with the Interstate Commerce Commission.

3. The United States Court of Appeals for the District of Columbia Circuit erred in considering as reason for its affirmance of the decision grounds which were not considered by the Trial Court.

ARGUMENT

James V. Mench, Jr. Was an Insured Under the Policy of Insurance Issued to the Respondent, Elliott Bros. Trucking Company, Inc.

In the order of the Trial Judge granting the respondents' motion for judgment, it is conceded that James V. Mench, Jr. was the owner of a truck which he had leased to Elliott Bros. Trucking Company, Inc., and that at the time of the accident Mench was on the business of the respondent, Elliott Bros. Trucking Company, Inc. (R 19). The answer of your petitioner stated that the truck, at the time of the accident, was under lease to Elliott Bros. Trucking Company, Inc., and was under the direction and control and on the business of Elliott Bros. Trucking Company, Inc., and that Mench was operating his tractor and trailer under the Interstate Commerce Commission permit issued to Elliott Bros. Trucking Company, Inc.,

and that Elliott Bros. Trucking Company, Inc. had a policy of insurance covering the tractor and trailer in the amounts of One Hundred Thousand Dollars to Three Hundred Thousand Dollars (R 4-6). The third-party complaint filed against the respondents contained the same allegations (R 7-8).

In the definition of the insured contained in the policy issued to the respondent, Elliott Bros. Trucking Company, Inc., the insured included the named insured and also included any person while using an owned automobile or a hired automobile and any person or organization legally responsible for the use thereof, provided the actual use of the automobile was by the named insured or with his permission. The Trial Court and the United States Court of Appeals for the District of Columbia Circuit interpreted the sentence "the insurance with respect to any person or organization other than the named insured does not apply: (d) with respect to any hired automobile, to the owner thereof or any employee of such owner;" as taking James V. Mench, Jr. out of the category of an insured. It was the contention of your petitioner in both Courts that this meant only that Mench himself, or his employee, could not recover from the named insured for any injury or damage sustained by them but that in the event of an accident and a suit by a member of the public that Mench was an insured under the policy and that the policy issued to Elliott Bros. Trucking Company, Inc. would cover Mench.

In *Malifsky* v. *Indemnity Insurance Company of North America*, 135 Fed. (2d) 910, from the Fourth Circuit Court of Appeals, and a decision by Circuit Judge Parker, a similar question was presented. In that case Wernig Express Company hired to the City of Baltimore one of its trucks and operated by one Charles Wernig, an employee of the Express Company. The truck, while operated by Charles Wernig, injured one Theodore Malif-

sky and he sued Charles Wernig. There was a judg[ment] against the driver, Charles Wernig, in the sum of [Four] Thousand Dollars ($4000.00) and the Fourth C[ircuit] Court of Appeals was called upon to decide, among [other] things, whether Charles Wernig was an insured u[nder] the policy issued to the Wernig Express Company [and] whether the terms of the policy prevented a recove[ry as] against the insurance company. There was a findi[ng in] the lower Court that Charles Wernig was an employ[ee of] the City and therefore a co-employee of the injured [per]son and that there could be no recovery. The Cou[rt, in] its construction of the policy, made the following s[tate]ment at page 911:

> "The crucial question with respect to the ap[plica]tion of the omnibus coverage clause is whethe[r the] truck driver, in carrying on the work which res[ulted] in Malisfski's injury, is to be considered an emp[loyee] of the express company or of the city. If he [was] an employee of the express company and not o[f the] city, liability for the injury rested upon the ex[press] company and the omnibus coverage clause woul[d ap]ply, since the injured man was not an employ[ee of] the same insured. If, however, he was an emp[loyee] of the city, liability for the injury rested upo[n the] city and the clause would not apply since the in[jured] man also was an employee of the city, the sam[e in]sured, and the case would fall within the prov[isions] of exception (c) above quoted."

In the case of *Lumber Mutual Casualty Insurance Com*-*pany* v. *Stukes*, 164 Fed. (2d) 571, the Fourth C[ircuit] Court of Appeals was again called upon to decid[e the] same point raised in this appeal.

One Melvin Blease Stukes, Administrator of the [Estate] of Eugene David Stukes, filed an action for da[mages] against Marshall and others in a South Carolina [State] Court stating that Eugene Stukes had been killed [by the] negligence of a motor truck owned by one Marsha[ll and] operated by one Timmons. The Lumber Mutual Ca[sualty]

Insurance Company of New York filed an action in the United States District Court for a declaratory judgment covering its liability on a policy issued to Marshall and the Trial Court directed a verdict for the defendants and the Lumber Mutual Casualty Insurance Company appealed. There was considerable question as to whether Stukes was an employee of Timmons or an employee of Marshall. There was considerable question also as to whether or not Timmons was an employee of Marshall and the Court stated that it was a question for the jury and reversed the case. The Court, in construing the definition of an insured at page 573, made the following statement:

> "Even if Timmons was an independent contractor and Stukes was his employee and not Marshall's employee, however, the policy would not cover any liability which Timmons might incur through his negligent driving of the truck. It is true that Timmons was driving the truck with Marshall's permission and was therefore an additional 'insured' within the definition contained in the omnibus coverage clause. The exclusion clause, however, applies to the additional as well as the named insured because it excludes coverage in any case of 'bodily injury to or death of an employee of the insured.' Hence any injury negligently inflicted by Timmons upon his own employees would be outside the coverage. Kaifer v. Georgia Casualty Co., 9 Cir., 67 F. 2d 309. It will be noticed that the language is 'the insured' and not 'the named insured', the latter being the language used in the policy where the intention is to designate only the person to whom the policy is issued; and the omnibus coverage clause, as above pointed out, defines the word 'insured' as used in the policy so as to include any person using the automobile with the permission of the named insured. The purpose of the exclusion clause is to limit coverage to liability for injury to members of the general public and to exclude liability to employees of the insured. See State Farm Mutual Ins. Co. v. Brooks, 8 Cir., 136 F. 2d 807; Clinton Cot-

ton Oil Co. v. Hartford Accident & Indemnity Co., 180 S. C. 459, 186 S.E. 399.

> There can be no question that the purpose was to apply the exclusion to employees of an additional insured as well as to those of the named assured, when consideration is given to the clause providing that the omnibus coverage clause shall not apply where the person injured is an employee of the same employer as an employee driving the car. It is true that if Timmons was an independent contractor he would not be an employee operating the car, and this clause would have no application to him, but its use in the policy shows clear intention that coverage shall extend only to liability to the public and that there shall be no coverage in the case of employees of an insured. Because the omnibus coverage clause makes an additional insured of an employee operating the car, it was necessary to insert the clause in question to prevent employees of the same employer being considered as to him members of the public. See *Kaifer* v. *Georgia Casualty Co., supra.*"

These two cases from the Fourth Circuit had before the Court the same definition of an insured referred to as the omnibus clause in the policy. It is true that it had paragraph (c) to construe instead of paragraph (d) as in this case, but the same reasoning would apply to all of the exclusions. Both cases hold that the operator of the car is an additional insured where an action was filed by a person other than a co-employee of the person sued. In other words, the policy was issued to protect the operator of the automobile in an action by a member of the public but not from the action of an employee or co-employee for the reason that such actions are covered by other types of insurance. In this connection the case of State Farm Mutual Automobile Insurance Company v. Brooks, 136 Fed. (2d) 807, holds that a cardinal object of insurance is to distinguish between the public and those engaged in the business and to include the former and exclude the latter.

Mench Was an Insured Under the Endorsement to the Policy of the Respondent Filed With the Interstate Commerce Commission.

It was alleged in the pleadings that Mench was operating his truck under lease to Elliott Bros. Trucking Company, Inc., and on the Interstate Commerce Commission permit which was issued to Elliott Bros. Trucking Company, Inc., and on its business at the time that the accident occurred. In order to obtain this permit Elliott Bros. Trucking Company, Inc., was required to file an endorsement to its policy to accord with the requirements of the Interstate Commerce Commission regulations. This endorsement is set forth in the petition and in the second paragraph the respondent, Liberty Mutual Insurance Company, agrees to pay any final judgment recovered against the insured for bodily injury to or death of any person or loss of or damage to property of others, excluding injury to or death of the insured's employees or property, resulting from the negligent operation, maintenance or use of motor vehicles under certificate of public convenience and necessity or permit issued to the insured by the Interstate Commerce Commission. • • •

The United States Court of Appeals for the District of Columbia Circuit in this case has held that Mench was not an insured under this endorsement.

In the case of *War Emergency Co-Op. Association* v. *Widen-House*, 169 Fed. (2d) 403, the construction of this endorsement was presented to the Fourth Circuit Court of Appeals and Circuit Judge Parker, on page 406, made the following statement:

> "We agree with the District Judge that, so far as shippers and the general public are concerned, the defendant having accepted a license authorizing it to operate gasoline trucks upon the public highways in interstate commerce, must be held responsible for the

> operation of the trucks under the license, even though this is done through the agency of independent contractors."

Again at page 407, Judge Parker made the following statement:

> "The liability insurance was to protect those operating the trucks against claims for damage on the part of the public, not to protect the operators against damage which they themselves sustained from the operation."

The United States Court of Appeals for the District of Columbia Circuit, in its opinion, stated that the policy of insurance issued to Elliott Bros. Trucking Company and the endorsement thereon would have enured to the benefit of Jennie M. Emens had she chosen to sue Elliott Bros., but that it did not make Mench an insured under the Liberty policy. It is and has been the contention of your petitioner that the endorsement covered an action against the operator of the truck in any action filed by a member of the public.

This point was clearly brought up in the case of *American Fidelity & Casualty Company* v. *Pennsylvania Casualty Company*, 188 Fed. (2d) 364, which adopted as its decision the opinion of Chief Judge Darr, Trial Judge, in the case of *American Fidelity and Casualty Company* v. *Pennsylvania Casualty Company*, 97 Fed. Supp. 965. In that case Capital Motor Lines had a contract with the United States Government to transport certain persons under the Selective Training and Service Act. It was insured by the American Fidelity & Casualty Company. It had a permit issued by the Interstate Commerce Commission and had filed an endorsement to its insurance policy in accordance with the Act. Capital Lines, in order to fulfill its contract, had to obtain a bus and driver from the Cherokee Motor Coach Company, as had been done on previous occasions. Cherokee had a policy of insurance

with the Pennsylvania Casualty Company. Both the policies of insurance had the same definition of an insured. There was an accident and a number of the selectees were seriously injured and the question arose as to the extent of the liability of the Pennsylvania Casualty Company as the insurer of Cherokee. Cherokee also had an Interstate Commerce Commission permit and had filed an endorsement to its policy with a limit of Fifty Thousand Dollars ($50,000.00), but the basic limits of the policy were Five Thousand Dollars ($5000.00) and Ten Thousand Dollars ($10,000.00).

A proper decision of the case required a construction of the word "insured" as contained in both policies and the Court, at page 970, made the following statement:

> "To reach a proper interpretation it is necessary to construe the endorsement in the light of the provisions of the Federal Motor Carrier Act.
>
> The Act, 49 U. S. C. A. 315, provides that 'No • • • permit shall be issued to a motor carrier • • • unless such carrier complies with such reasonable rules and regulations • • • governing the filing and approval of surety bonds, policies of insurance • • • conditioned to pay • • • any final judgment recovered against such motor carrier • • • resulting from the negligent operation • • • or use of motor vehicles under such certificate or permit'.
>
> It is thus provided that the insurance required shall in terms cover the 'motor carrier' which obtains the permit, and such insurance shall be conditioned to pay any judgment recovered against 'such motor carrier' resulting from the negligent operation or use of motor vehicles 'under such certificate or permit'.
>
> In translating or integrating the provisions of the Act into the language of the endorsement on the policy, it is evident that the words 'motor carrier' as found in the Act were paraphrased in the policy to the word 'insured', that being the appropriate insurance term, and the 'insured' was intended to mean

the motor carrier operating the vehicle under the particular permit with respect to which the insurance coverage was provided.

In other words, where insurance was taken, as here, for the purpose of obtaining a permit or certificate of public convenience and necessity under the Act, the provisions of the Act enter into and become a part of the policy of insurance; and such statutory provisions override and supersede anything in the policy repugnant to such provisions. Johnson Transfer & Freight Lines v. American National Fire Ins. Co., supra. Cf. U. S. Fidelity & G. Co. v. Guenther, 281 U. S. 34, 50 S. Ct. 165, 74 L. Ed. 683.

The word 'insured' in this endorsement must, therefore, be interpreted to mean the 'motor carrier' operating the vehicle under the permit with respect to which the insurance was provided and not the meaning given under the extended coverage clause.

Moreover, without regard to the definition of the word 'insured' in the endorsement, the coverage is limited to the provisions of the endorsement even though in conflict with other parts of the policy. Under the endorsement there arises no liability unless the vehicle is being operated under the permit issued to the named insured motor carrier.

Inasmuch as the bus, in this case, was being operated under Capital's permit and not under the permit of Cherokee the increased liability under this endorsement would not be applicable and the original policy limit will prevail."

The respondent, Elliott Bros. Trucking Company, was in the same category as Capital Lines and James V. Mench, Jr. was in the same category as Cherokee. The only distinction between the policies was that in the policy issued to Mench there was the statement as set forth in the petition covering other insurance coverages that the insurance issued to Mench covering liability and property damage was excess insurance over any other valid and collectible insurance available to the insured. Cherokee had no such limitation and it being held that Capital

Lines was an additional insured under the policy of Cherokee that they were liable up to the normal limits of its policy. The policy issued to Mench did not operate until the policy issued to Elliott Bros. Trucking Company had been exceeded.

The endorsement to the policy issued to Elliott Bros. and filed with the Interstate Commerce Commission is very specific and it covered as an insured any person operating a motor vehicle under the Interstate Commerce Commission permit issued to Elliott Bros. Trucking Company for any action brought by any person excluding only injury or death to the insured's employees or property.

If the decision of the Trial Court and the United States Court of Appeals were to stand the definition of the word "insured" would be meaningless for with the exclusions as interpreted by the United States Court of Appeals the only person protected would be the named insured. A more judicial and practical interpretation of the omnibus clause of the policy would be that any person operating an automobile on the business of the named insured and with his permission would be covered by insurance as against any claim by a member of the public.

The United States Court of Appeals for the District of Columbia Circuit is Confined in Its Decision to the Grounds Assigned by the Trial Court in Its Order.

In the order granting the motion for summary judgment the trial Court gave as its reason the ground that Mench was not an insured under Liberty Mutual's policy of insurance with Elliott Bros. Trucking Company, Inc., and the third-party actions were dismissed. No other matter, either factual or legal, was before the United States Court of Appeals other than "was Mench an insured under the policy of insurance issued to Elliott Bros. Trucking Company, Inc."

The Court of Appeals in its decision went into other reasons as to why the action of the Trial Court should be affirmed. The petitioner has never had an opportunity to change its pleadings or its mode of procedure except as to the one point and that was whether Mench was an insured under Elliott Bros. policy and it was willing to stand on that point. This is unlike a case where the appellant has put in evidence its entire case and availed itself of all the rights which the rules of procedure permit.

In the case of *Thorn* v. *Browne*, 257 Fed. 519, the Court in referring to a somewhat similar point, at page 528, made the following statement:

> "The rules of law on this subject are:
>
> First. That when a verdict is directed on limited, but untenable, grounds, it may not be sustained on other grounds, unless it is clear beyond doubt that the new grounds could not have been obviated, if they had been called to the attention of the defeated party and he had been given an opportunity to meet them by evidence and argument at the time the direction was made. Peck v. Heurich, 167 U. S. 624, 17 Sup. Ct. 922, 42 L. Ed. 302; Baker v. Kaiser, 126 Fed. 317, 319, 320, 61 C. C. A. 303.
>
> Second. When a court has directed a verdict upon a specific, but untenable, ground, after the defeated party had been permitted to introduce all the legal evidence he offered and has rested his case, and it is clear beyond doubt, from a bill of exceptions which contains all the evidence, that the evidence would not sustain any other verdict, an appellate court may lawfully affirm the verdict on some new or other ground. And the reason that it may do so in such a case is that, when the defeated party has been permitted to introduce all the legal evidence he offered and has rested his case at the trial, he has thereby admitted, and in that way has estopped himself from denying, that he can do no more to overcome the objection that the evidence is insufficient to sustain a verdict in his favor."

In the case of *Rectangle Ranche Co. v. Board of Commissioners*, 96 Fed. (2d) 825, the same question was before the Court and the Court, at page 826, made the following statement:

> "It will not do, as appellee argues, to urge upon us that the bill ought to have been and was dismissed for want of equity. It is perfectly clear that it was not. On its face the order in terms declares that the bill was dismissed because the motion of April 20, 1937, to dismiss for want of jurisdiction, was sustained.
>
> We do not decide, the matter is not properly before us for decision, whether, if the matters relied on by defendant were all set out in the bill, a cause of action in equity would be stated. We merely decide that it was error to dismiss the bill for want of jurisdiction, and we remand the cause for further and not inconsistent proceedings."

CONCLUSION

The record before this Court clearly discloses that Mench was an insured both within the terms of the policy of insurance issued by Liberty Mutual Insurance Company, a Corporation, to Elliott Bros. Trucking Company, Inc., a Corporation, and also that Mench was an insured under the endorsement filed with the Interstate Commerce Commission.

It is further evident that the United States Court of Appeals for the District of Columbia Circuit based its decision on grounds other than those presented to the Trial Court.

It is respectfully submitted that the decision of the United States Court of Appeals for the District of Columbia Circuit in this case is in conflict with the decisions of numerous United States Circuit Courts of Appeals where these questions have arisen; that the questions presented in this petition are of extreme im-

portance and wide application for the petitioner and the respondent, Liberty Mutual Insurance Company are engaged in the issuance of policies of insurance in various other states, including nearby Maryland and Virginia, where the decisions of its United States Courts are in conflict on this very point with the decision of the United States Court of Appeals for the District of Columbia, and that the writ of certiorari should be granted in this case in order that the questions presented herein may be clarified and settled by this Honorable Court.

CORNELIUS H. DOHERTY
ALFRED L. BENNETT
1010 Vermont Avenue, N.W.
Washington, D. C.
Attorneys for Petitioner